83-450

No.

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FILED
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ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1983

NO.

HOWARD A. HULL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Filed September 16, 1983.

QUESTIONS PRESENTED

I. In a criminal tax prosecution, must the Trial Court submit to the jury the question of legal residence/venue, where there is a dispute as to the factual existence of venue? (The First, Second and Fifth Circuits hold yes; the Third Circuit holds no.)

II. In a charge of willful failure to file a federal income tax return, 26 U.S.C. §7203, is the prosecutor required to prove beyond a reasonable doubt, legal residence/venue. (The Second, Fifth, Ninth, and Tenth Circuits hold yes; the Third Circuit holds no.)

III. Does the accused in a criminal tax prosecution have, under 26 U.S.C. §3237(b), the absolute right to change the venue to his place of legal residence? (The Fifth, Seventh and Ninth Circuits hold yes; the Third Circuit holds no).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

NO.

HOWARD A. HULL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the order of August 12, 1983 of the United States Court of Appeals for the Third Circuit, which order denied Petitioner's Motion for Rehearing or in the Alternative Suggestion for Hearing or Rehearing en banc, and to

review the Judgment of July 18, 1983 of said court which Judgment affirmed the conviction of this Petitioner.

OPINION BELOW

Petitioner appealed his conviction from U.S. District Court in the Western District of Pennsylvania to the U.S. Court of Appeals for the Third Circuit. In an unpublished "judgment order", the Third Circuit, without any opinion or citation of case law, affirmed the conviction. (Appendix A.) The Court held, inter alia, that:

(1) The District Court did not err in denying Defendant's motion for change of venue.

(2) The evidence was sufficient to establish Defendant's legal residence and venue at Pittsburgh, Pennsylvania, and,

(3) The Government was not required to prove legal residence/venue beyond a reasonable doubt.

"Petition for Rehearing or in the Alternative, suggestion for Hearing or Rehearing En Banc" was denied on August 12, 1983. (Appendix B.) However, on Petitioner's "Motion for Stay of Mandate Pending application for Certiorari", the Third Circuit stayed the Mandate, allowing Petitioner until September 18, 1983 to petition this Court for Certiorari. (Appendix C.)

JURISDICTION

The final judgment of the Court of Appeals was entered on August 12, 1983. This petition is timely filed within sixty (60) days of the final judgment of the lower court. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. In a criminal tax prosecution, must the Trial Court submit to the jury the question of legal residence/venue, where there is a dispute as to the factual existence of venue? (The First, Second and Fifth Circuits hold yes; the Third Circuit holds no.)

II. In a charge of willful failure to file a federal income tax return, 26 U.S.C. §7203, is the prosecutor required to prove beyond a reasonable doubt, legal residence/venue. (The Second, Fifth, Ninth, and Tenth Circuits hold yes; the Third Circuit holds no.)

III. Does the accused in a criminal tax prosecution have, under 18 U.S.C. §3237(b), the absolute right to change the venue to his place of legal residence? (The Fifth, Seventh and Ninth Circuits hold yes; the Third Circuit holds no.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy tne right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been commited, which district shall have been previously ascertained by law . . . .

STATEMENT OF THE CASE

Petitioner was charged and convicted by jury trial of two counts of alleged willful failure to file federal income tax returns for the calendar years 1977 and 1978. The charges were brought by Grand Jury indictment within the U.S. District Court for the Western District of Pennsylvania.

Pre-trial, and throughout trial, Petitioner argued that venue was not proper for reason that he was not a legal and permanent resident of the Western District of Pennsylvania but rather was a legal and permanent resident of Phoenix, Arizona. He also requested change of venue pursuant to 18 U.S.C. §3237(b), which section guarantees change of venue in a tax crime such as charged, where the change is to be made to the District of which the defendant is a legal resident. Defendant placed before the court, by way of affidavit and Offers of Proof at time of trial, numerous facts supporting his allegation that he never intended to be a legal and permanent resident of Pennsylvania, but rather temporarily lived in Pittsburgh as a transient.

The Trial Court took the position

that the question of legal residence, and therefore, venue, was one of law for the Court, and refused not only the request for change of venue, but refused to submit the question as a question of fact to the jury. Petitioner presented timely request of jury instructions to the effect that the government was required to prove beyond a reasonable doubt that the Petitioner was a legal resident of the Western District of Pennsylvania. These instructions were refused and the Court throughout the trial refused to allow Petitioner to present his Sixth Amendment defense that he was charged in the wrong district.

REASONS FOR GRANTING THE WRIT

I. Because of the importance of the constitutional questions to tax law, and because of the express conflict between the federal circuit courts and the recurrence of the issue on appeal, this Court should decide whether the trial court should submit to the jury the question of legal residence/venue where, in a criminal tax prosecution, there exists a dispute as to the factual existence of venue.

II. Because of the importance of the constitutional question to tax law, and because of the express conflict between the federal circuits and recurrence of the issue on appeal, this Court should decide whether the prosecutor is required to prove beyond a reasonable doubt legal residence/venue in

a case of willful failure to file federal income tax returns, 26 U.S.C. §7203.

III. Because of the importance of the constitutional question to tax law, and because of the express conflict between the federal circuit courts and the recurrence of this issue on appeal, this Court should decide whether the accused in a criminal tax prosecution has, under 18 U.S.C. §3237(b), the absolute right to change of venue to his place of legal residence.

I.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTIONS TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICT BETWEEN THE FEDERAL CIRCUIT COURTS AND THE RECURRENCE OF THE ISSUE ON APPEAL, THIS COURT SHOULD DECIDE WHETHER THE TRIAL COURT SHOULD SUBMIT TO THE JURY THE QUESTION OF LEGAL RESIDENCE/VENUE WHERE, IN A CRIMINAL TAX PROSECUTION, THERE EXISTS A DISPUTE AS TO THE FACTUAL EXISTENCE OF VENUE.

Even the government, at page 19 of its Response Brief to the Third Circuit, conceded that in numerous circuits, the question of venue must be submitted to the jury, the government stating:

> Although there are cases in other circuits which hold that under certain circumstances, the issue of whether venue was properly laid must be submitted by properly instructed jury, see U.S. v. Dziurgot, 664 F.2d 6 (1st Cir., 1981); U.S. v. Blackcloud, 590 F.2d 270 (8th Cir., 1979); U.S. v. Grammaticos, 633 F.2d 1013 (2nd Cir., 1980), this circuit has never so held. Nor should it ....

The government further conceded that a majority of other circuits have held that the government at least need establish venue by preponderance of the evidence, government's brief at 25. See U.S. v. Panebianco, 553 F.2d 447 (2nd Cir. 1976); U.S. v. Lisowski, 504 F.2d 1268 (7th Cir. 1978); U.S. v. Haley, 500 F.2d 308 (8th Cir. 1974); U.S. v. Luton, 586 F.2d 1021 (5th Cir. 1973).

And finally, the government conceded at Page 22 of its Brief, that some circuits have held that venue must be submitted to the jury where there is a dispute as to the factual existence of venue:

> In the alternative, even those cases which hold that the question of venue must be submitted to the jury under some circumstance require that the question of venue be submitted only where there is a dispute as to the factual existence of venue. See U.S. v. Blackcloud, 590 F.2d 278 (8th Cir. 1979)....

In the case at bar, the District Court denied the Defendant his pre-trial and trial attempt to even raise lack of proper venue as a defense, notwithstanding Defendant's sworn allegations which raised the factual issue of his legal residence.

The Third Circuit, without opinion, held in effect that the government in a tax case such as this need not prove beyond a preponderous of the evidence that the Defendant was a legal resident of the subject district, much less prove beyond a reasonable doubt that the Defendant was a legal resident of the subject district. Notwithstanding the Third Circuit's judg-

ment in this case, it was the Third Circuit which recognized in U.S. v. Passodelis, 615 F.2d 975, 976 (3rd Cir. 1980) the importance of venue in a criminal case, reversing the conviction due to insufficient evidence to show venue, and relying upon Article III, Section II, Clause 3 of the United States Constitution and the Sixth Amendment to the U.S. Constitution, stating:

> The question of where an accused shall stand trial was a matter of such importance to those who wrote the Constitution and the Bill of Rights that they dealt with it in two separate provisions.

II.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTION TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICT BETWEEN THE FEDERAL CIRCUITS AND RECURRENCE OF THE ISSUE ON APPEAL, THIS COURT SHOULD DECIDE WHETHER THE PROSECUTOR IS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT LEGAL RESIDENCE/VENUE IN A CASE OF WILLFUL FAILURE TO FILE FEDERAL INCOME TAX RETURNS, 26 U.S.C. §7203.

Under charge of willful failure to file federal income tax return, 26 U.S.C. §7203 Petitioner urges, as many Circuits have held, that the government must prove beyond a reasonable doubt that Defendant was required to file a federal income tax return in the district in which the crime is alleged to have been committed, or within the IRS Service Center serving said District. For this reason, the government was required to prove beyond a reasonable doubt that this Defendant was a legal resident of the District for the U.S. District Court, Western District of Pennsylvania. By the Trial Court's adament refusal to submit this question of fact to a panel of twelve impartial jurors, Defendant was denied his Fifth Amendment right to due process of law, and his Sixth Amendment right to trial by jury in the proper district. (See charging statute, App. D)

This Court should consider the legion of authority by way of other circuit opinions which have held, expressly, that the Government must prove defendant's legal residence beyond a reasonable doubt in a charge of failure to file federal income tax return. In U.S. vs. Brewer, 486 F.2d 507 (10th Cir. 1973), the Court held, at 509:

> The prosecution must then establish beyond a reasonable doubt that the defendant's residence in this, a tax case, was Oklahoma City. (Emphasis Added.)

In U.S. vs. Calhoun, 566 F.2d 969, (5th Cir. 1978), the Court stated at 973:

> The Court instructed the jury that in order to convict they had to find beyond a reasonable doubt that defendant was a legal resident of the middle district during the two years in question. (Emphasir Added.)

See also similar holdings of other circuits: U.S. vs. Commerford, 64 F.2d 28,

(2nd Cir. 1933); Yarborough vs. U.S., 230 F.2d 56, (4th Cir. 1956); U.S. vs. Youse, 387 F.Supp 132 (E.D. Wisc. 1975); U.S. vs. Wortman, 26 F.R.D. 183 (E.D. Ill. 1960); U.S. vs. Clinton, 464 F.2d 574 (9th Cir. 1978); U.S. vs. DeMarco, 394 F.Supp 611, (D.D.C. 1975); U.S. vs. Dalitz, 248 F.Supp. 238 (S.D. Calif. 1965).

In Brewer, supra, defendant was charged and tried for failure to file federal income tax returns. Having been tried and convicted within the United States District Court for the Western District of Oklahoma, defendant argued on appeal that the evidence was insufficient to establish that his legal residence was Oklahoma City, Oklahoma, located within the Western District. In deciding the issue, the Court noted at 509 that:

> The term "residence" has been equated with domicile. See

> Pietro Crespi, 44 B.T.A. 670, 674, (1941), Samuel W. Weis, 30 B.T.A. 478, 486, (1934); L.B. Peples, 27 B.T.A. 879, 882 (1933); Gates vs. Commissioner, 199 F.2d 291, (10th Cir. 1952). This requires residence and intention to remain, and intention is a highly important element.

And in Calhoun, supra, another failure to file income tax return case, the court approved the following jury instruction:

> "Legal residence" means the permanent fixed place of abode which one intends to be his residence and to return to it despite temporary residences elsewhere or absenses. In determining whether the defendant was a legal resident of the Leesburg [Florida] area, you may consider whether or not the defendant intended to remain in St. Croix or St. Maarten permanently, or whether he intended to return from those islands to the Leesburg area.

In the case at bar, the Court accepted as uncontroverted the facts regarding Defendant's legal residence, and his intentions toward legal residence. The Court was of the

opinion from commencement of trial, that as a matter of law Defendant was a legal resident of Pittsburgh, Pennsylvania on April 15th for the years in question. The Government did not submit controverting affidavits nor present evidence, for Defendant's Motion for Evidentiary Hearing on the Issue was denied.

Under the Sixth Amendment to the United States Constitution, an accused cannot be tried in a district other than the district in which the offense was commited. Salinger vs. Loisel, 44 S.Ct. 519, 522 (1924). See also, Commerford, supra, at 32, in which, in a case of failure to file federal income tax returns, the U.S. Court of Appeals for the Second Circuit stated:

> And where the offense, as here, consists of the failure to file a document,

> it is commited in the place where the document should have been filed and not elsewhere. [Citing two Supreme Court cases and another Second Circuit case.]

In Zicarelli vs. Gray, 543 F.2d 466, (3rd Cir. 1976) the court recognized, at 477 the Sixth Amendment principle that "a trial must take place before a jury drawn within the state and federal judicial district in which the crime was commited...."

III.

BECAUSE OF THE IMPORTANCE OF THE CONSTITUTIONAL QUESTION TO TAX LAW, AND BECAUSE OF THE EXPRESS CONFLICTS BETWEEN THE FEDERAL CIRCUIT COURTS AND THE RECURRENCE ON THIS ISSUE ON APPEAL, THIS COURT SHOULD DECIDE WHETHER THE ACCUSED IN A CRIMINAL TAX PROSECUTION HAS, UNDER 18 U.S.C. §3237(b), THE ABSOLUTE RIGHT TO CHANGE OF VENUE TO HIS PLACE OF LEGAL RESIDENCE.

Defendant timely moved for Change of Venue or in the Alternative, for Evidentiary Hearing under 18 U.S.C. §3237(b), which

motions were denied. Said section provides in part as follows (App. E):

> . . . where an offense is described in §7203 of the Internal Revenue Code of 1954. . . and prosecution has begun in the judicial district other than in the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun elect to be tried in the district in which he was residing at the time the alleged offense was commited. . . . (Emphasis Added.)

In the case of U.S. vs.Youse, 387 F.Supp 132 (D.C. Wisconsin 1975) (7th Cir.), defendant was charged with income tax violations and moved for change of venue under 18 U.S.C. §3237. The court held that a motion under said section is not directed towards discretion, but that the defendant was granted by Congress an absolute right to be tried for certain

violations in the district of his residence. See also, U.S. vs. Wortman, 26 F.R.D. 183 (D. Ill. 1960) (7th Cir.); U.S. vs. Calhoun, 566 F.2d 969, 973 (5th Cir. 1978); U.S. vs. Brewer, 486 F.2d 507, 509 (10th Cir. 1973).

This very issue was most recently decided in favor of the accused by the U.S. Court of Appeals for the Ninth Circuit in the case of U.S. vs. Solomon, 693 F.2d 68, (9th Cir. 1982). See also, U.S. vs. Dalitz, 248 F.Supp. 238 (S.D. Calif. 1965); U.S. vs. Demarco, 394 F.Supp 611, (D. D.C. 1975); U.S. vs. Rosenberg, 226 F.Supp. 199 (S.D. Fla. 1964); U.S. vs. Wortman, 26 F.R.D. 183 (E.D. Ill. 1960); U.S. vs. Kimble, 186 F.Supp. 616 (S.D. N.Y. 1960). See Wortman, supra, at 192 wherein the court stated:

> The Congress apparently did not provide the courts with discretion in determining the facts or circumstances under which a transfer would be justified; rather, Congress intended that defendants be given the absolute right to be tried for alleged violation of the sections enumerated in paragraph (b) of section 3237 in the district of the residence regardless of the distance involved. (Emphasis Added.)

See Senate Report No. 1625, 89th Congress reprinted in 1966 U.S. Code Congressional and Administrative News 3676, 3681 (addition to §3237(b) of willful failure to file income tax return as a crime for which the transfer option would be available a defendant); Senate Report No. 1952, 85th Congress, Second Session at 1, reprinted in 1958 U.S. Code Congressional and Administrative News 3261, 3262 (original "home venue option"). For a narrow reading of the subject section, compare In re, United States (Clemente) 608 F.2d 76, (2nd Cir. 1979).

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the Judgment entered herein by the U.S. Court of Appeals for the Third Circuit.

DATED this 15th day of September, 1983.

MacPHERSON & McCARVILLE, P.A.

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HOWARD A. HULL
(602) 944-3328

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5748

UNITED STATES OF AMERICA

vs.

HOWARD HULL,

Appellant

(Criminal No. 82-112-W.D.Pa.-Pittsburgh)

District Judge: Honorable Gerald J. Weber

Submitted Under Third Circuit Rule 12(6)
July 15, 1983

BEFORE: SEITZ, Chief Judge, SLOVITER, Circuit Judges, and LORD, District Judge.*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that (1) the district court erred in denying defendant's motion to dismiss for lack of

jurisdiction, (2) the district court erred in denying defendant's motion for change of venue, (3) the evidence was insufficient to establish that defendant's legal residence was Pittsburgh, Pennsylvania, and (4) defendant was denied his constitutional rights to fair trial and due process of law, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court

_____
Chief Judge

ATTEST:

_____
Sally Mrvos, Clerk

DATED: July 18, 1983

*Joseph S. Lord, III, Judge of the United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5748

UNITED STATES OF AMERICA,

vs.

HOWARD A. HULL,

Appellant

(Criminal No. 82-112-W.D.Pa.-Pittsburgh)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, BARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and LORD, District Judge.*

The petition for rehearing filed by appellant in the above entitlted case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz,
Chief Judge

DATED: August 12, 1983

*Joseph S. Lord, III, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5748

UNITED STATES OF AMERICA

vs.

HOWARD A. HULL,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 18, 1983.

Chief Judge

DATED: AUG 19, 1983

APPENDIX D

Sec. 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation) or imprisoned

not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure.

APPENDIX E

§3237. Offenses begun in one district and completed in another.

. . .

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing

at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Constance M. Bowden
Assistant U.S. Attorney
633 United States Post
Office & Courthouse
Pittsburgh, PA 15219

on this 15 day of September, 1983.

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